

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GREG ALLEN,)	
)	
Plaintiff,)	
vs.)	NO. 1:02-cv-00902-RLY-TAB
)	
INTERNATIONAL TRUCK AND ENGINE)	
CORPORATION,)	
NAVISTAR INTERNATIONAL)	
CORPORATION,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GREG ALLEN, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	1:02-cv-0902-RLY-TAB
)	
INTERNATIONAL TRUCK AND ENGINE,)	
)	
Defendant.)	

ORDER ON MOTIONS TO WITHDRAW AND TO SEAL RECORDS¹

On October 28, 2005, Defendant filed its reply brief in support of summary judgment along with an appendix of exhibits. [Docket No. 45.] Inadvertently included among those exhibits were attorney billing records for this case. On March 13, 2006, Defendant filed a motion to withdraw these billing records and to substitute the correct document in their place. [Docket No. 134.] Defendant also filed a motion to seal the billing statements. [Docket No. 133.] Timely motions to withdraw and to seal inadvertently filed attorney billing records would ordinarily be granted with little fanfare. However, this is no ordinary case. Plaintiffs have objected to sealing the billing records and claim that Defendant's filing of these records waived any attorney-client privilege. [Docket No. 137, p. 1.]

¹This entry is a matter of public record and will be made available on the Court's website. However, the Court does not consider the issues addressed in this entry sufficiently novel to justify commercial publication.

The parties agree that, pursuant to *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997),² and its progeny, a five-part balancing test applies in determining whether waiver occurred. [Docket No. 142, p. 2; Docket No. 137, p. 2.] Utilizing this approach, the Court must weigh: (1) the reasonableness of the precautions taken to prevent the disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.

As for the reasonableness of the precautions taken to prevent the disclosure, this is not a situation in which a few documents were inadvertently disclosed to opposing counsel during a massive production of discovery. Rather, the situation involves billing statements filed with the Court as part of a summary judgment submission, which statements have absolutely nothing to do with the summary judgment issues before the Court. Even given the occasional challenges associated with electronic filing, it is hard for the Court to envision that reasonable precautions were in place to prevent what occurred. Defendant's reply brief attempts to shift responsibility for this errant filing on a legal assistant. [Docket No. 142, p. 3 at n.1.] But Fed. R. Civ. P. 11(b) puts on the attorney – not the attorney's legal assistant – responsibility for certifying the accuracy of filings and submissions. In light of the foregoing, this factor favors waiver.

The second factor is the time taken to rectify the error. The motions to seal and to withdraw at issue here were filed nearly five months after the Defendants first submitted the billing records in question. Thus, these motions are not timely. Defendant argues that the motions are timely because the Defendant acted promptly after becoming aware of the error.

²In *Dellwood Farms*, Judge Posner discussed the law enforcement investigatory privilege in particular and waivers of privilege in general. This discussion, however, was *dicta*, as Judge Hamilton observed in *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 648 (S.D. Ind. 2000). Nevertheless, the Court finds this balancing approach helpful and applies it in the instant action.

[Docket No. 142, p. 4.] Under Defendant's approach, motions to seal/withdraw would be timely as long as they were filed promptly after the disclosing party became aware of the inadvertent filing – irrespective of how long the document had been disclosed (or in this case, a matter of public record). Accepting this approach would discourage parties from scrutinizing their filings. Such an approach is ill advised. Accordingly, this factor also favors waiver.

The third factor examines the scope of the discovery. This factor does not fit neatly in the instant analysis since the documents were not sought or produced as part of discovery. Thus, consideration of this factor is not particularly useful. The fourth factor is the extent of the disclosure. The documents disclosed consist of 32 pages of billing records from June to September 2003. Thus, these documents are fairly limited in scope, and they are not directly relevant to the pending summary judgment motion. On the other hand, the disclosure itself was far reaching, since the documents are now part of the public record. These facts tend to counterbalance each other and, when considered on the whole, the fourth factor is largely of minimal impact either for or against waiver.

The fifth and final factor – the overriding issue of fairness – strongly tips the balance in favor of waiver. The disputed billing records have direct relevance to Plaintiffs' pending motion for sanctions.³ [Docket No. 132.] Plaintiffs contend in their sanctions motion that these billing records establish that Defendant's counsel made material misrepresentations to the Court during a February 1, 2006 proceeding. Specifically, Plaintiffs contend that these billing records contradict defense counsel's representations to the Court that Defendant's law firm had no involvement with an undercover investigation conducted at Defendant's facility. If such misrepresentations occurred, this could constitute a serious breach of defense counsel's

³These records may also have some relevance to Defendant's pending motion to quash [Docket No. 91], which is also noted below.

professional responsibilities. The Defendant disputes making any such misrepresentations. [Docket No. 143.] This is obviously an issue that the Court must scrutinize, and the billing records are central to this inquiry. Overriding fairness demands that these crucial billing records remain a part of the public record.

The Seventh Circuit Court of Appeals has often emphasized that what happens in the federal courts is presumptively open to public scrutiny. *E.g., Baxter Intern., Inc. v. Abbott Laboratories*, 297 F.3d 544 (7th Cir. 2002) (denying a renewed, joint motion to place documents under seal, and stressing that parties must offer legal justification for placing documents under seal). The Seventh Circuit did so again recently in *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) (“The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.”). No such justification exists here. Applying the five-part balancing test set forth above, the Court finds that counsel’s filing of the billing records under the circumstances presented here waived the attorney-client privilege.

Given the gravity of the issues presented in Plaintiffs’ motion for sanctions, the Court finds that oral argument on this motion is appropriate. Accordingly, Plaintiffs’ motion for sanctions [Docket No. 132] is set for oral argument at 3 p.m. on April 19, 2006 in Room 238, U.S. Courthouse, 46 E. Ohio Street, Indianapolis, Indiana 46204. Parties shall appear by counsel, who shall be prepared to present argument on this motion. Pending resolution of this motion, Defendant’s motion to quash [Docket No. 91] remains under advisement. Counsel may orally supplement their arguments at the April 19 oral argument regarding this pending motion to quash to the extent that such arguments are relevant to issues raised by the billing records.

For all these reasons, Defendant’s motion to seal the billing statements [Docket No. 133]

is denied. Defendant's motion to withdraw these billing records [Docket No. 134] is denied to the extent that the records shall not be withdrawn, but granted to the extent that the motion seeks to supplement the record with the correct document for summary judgment purposes.

Dated:

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